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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 667

PAUL A. GORIN, HENRY GRILLO AND SAUL GLASSMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1a–5a) is reported at 336 F. 2d 211. The opinion reversing a prior conviction is reported at 313 F. 2d 641, certiorari denied, 374 U.S. 829.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1964. A petition for rehearing was denied on October 9, 1964. The petition for a writ of certiorari was filed on November 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed because of pre-indictment publicity.

2. Whether the method used for selecting grand and petit jurors was improper.

3. Whether evidence introduced against petitioners was the "fruit" of unlawful conduct by a government agent.

4. Whether the evidence established entrapment as a matter of law.

5. Whether the instructions to the jury on entrapment were proper.

6. Whether electrical recordings, which corroborated the testimony of an Internal Revenue Service attorney regarding his conversation with petitioners, were properly introduced into evidence.

7. Whether certain evidence was illegally seized from petitioner Glassman at the time of his arrest.

8. Whether various trial rulings were correct.

STATEMENT

Petitioners and Nathaniel Bergman were indicted in the District Court for Massachusetts on three counts. Count 1 charged a conspiracy among all defendants to bribe Charles J. McCaffrey, an employee of the Internal Revenue Service, and to defraud the United States; count 2 charged that petitioners Glassman and Gorin, together with Bergman, gave $10,000 to McCaffrey with intent to bribe; count 3 charged petitioner Grillo with conspiracy to defraud the United States of his services as

an internal revenue officer (R. 10–16).[1] In 1962, after a jury trial, petitioners were convicted. The court of appeals reversed their convictions on the ground that the district court had inadequately instructed the jury on the burden of proof required for the defense of entrapment. 313 F. 2d 641, certiorari denied, 374 U.S. 829. On retrial, petitioners were again convicted. Glassman was sentenced to imprisonment for a period of three years and fined $5,000; Gorin was sentenced to imprisonment for two years and fined $5,000; and Grillo was sentenced to imprisonment for one year and fined $1,500 (R. 8–9). The evidence at the trial may be summarized as follows:

In 1961, the Internal Revenue Service was investigating the income tax returns of Nathaniel Bergman, a Connecticut lawyer. In May 1961, a recommendation for criminal prosecution of Bergman was sent to the Boston regional office of the Intelligence Division of the Internal Revenue Service, where petitioner Grillo was an executive assistant, and then to the Boston Regional Counsel's office for review by its Enforcement Branch, headed by Charles J. McCaffrey, who was a training officer in a Marine Corps reserve unit commanded by petitioner Glassman (R. 508–509, 513–514).

On June 1, 1961, Glassman came to McCaffrey's office to discuss the Bergman case, inquiring about

[1] The record on file with the Clerk consists of the appendices filed below including an appendix filed in the first appeal. The latter appendix is designated herein as "A".

the strength of the government's case (R. 515–518). McCaffrey, after first stating that he should not talk to Glassman because Glassman had not filed an authorization to appear for Bergman, characterized the case as very strong. He disclosed the amounts of the proposed tax deficiencies and other facts. Glassman responded that in a case of this size "there is enough of a fee in it for all of us" (R. 518–519). McCaffrey testified that he spoke with Glassman despite Glassman's failure to file a power of attorney because McCaffrey knew that Gorin was one of the attorneys in the case; this made him extremely suspicious, and he determined to discover if anything was wrong (R. 153–154). McCaffrey reported this conversation to a superior (R. 520).

On June 14, 1961, Glassman told McCaffrey that he had been visited by a friend of Bergman and had demanded $35,000 in escrow, payable if the Bergman case was quashed in McCaffrey's office. McCaffrey replied, "Oh, we will have to play it by ear" (R. 522). The next morning McCaffrey reported this conversation to the Inspection Service, which gave him instructions as to his future conduct in the Bergman case (R. 523).

McCaffrey telephoned Glassman on June 20, 1961, and said he had reassigned the case to himself so that he could review it personally; Glassman said, "Wonderful, wonderful" (R. 527–528). Later that day, Glassman told McCaffrey that he would make Bergman put up part of the escrow money in cash. McCaffrey responded, "Saul, we know what we're

talking about. Let's lay it on the line. What do you have in mind for me?" Glassman replied that McCaffrey would receive between $10,000 and $15,000, adding that he knew of two other cases and that "[t]his thing can start to snowball" (R. 530–532).

On June 21, at a regular Marine Corps reserve meeting, Glassman told McCaffrey that Bergman had agreed to everything. When McCaffrey asked whether anyone would want to review his memorandum recommending against prosecution, Glassman said that he would do so. He also said that half the money would be paid when the memorandum was sent from the enforcement office (R. 533–535).

On June 27, Glassman reported that he had received $15,000 and gave McCaffrey $5,000 in one-hundred dollar bills. He then advised McCaffrey that Gorin had the remainder of the money in his account. McCaffrey showed Glassman a draft of the memorandum recommending no criminal action against Bergman and permitted it to be copied. When Glassman stated that the government file should contain a letter from Gorin as a basis for the points discussed in the memorandum, McCaffrey suggested a back-dated letter (R. 541–547, 203). On the same day, checks totalling $41,500, drawn by Bergman payable to Gorin as trustee, were deposited in a new account opened in the name of Gorin and his brother as trustees (R. 557). On the following day, McCaffrey gave Glassman a final draft of the memorandum and was again paid $5,000 in one-hundred dollar bills (R. 552–555). On July 10, McCaffrey received the back-dated letter signed by Gorin (R. 563–565).

Under Internal Revenue Service practice, the Regional Intelligence office would determine whether to support the recommendation made in the criminal action memorandum or file a protest (R. 509–511). In the conversation between Glassman and McCaffrey on June 27 and 28, Grillo was mentioned as the person who had been approached in the Regional Intelligence office (R. 542–543, 553–554). On July 10, after the Intelligence Division at Hartford wrote McCaffrey that it intended to protest the recommendation, McCaffrey complained to Glassman that Grillo had approved the protest (R. 567–568). On July 13, McCaffrey, in the course of a conversation with Grillo about another tax case, asked him if he had read McCaffrey's memorandum in the Bergman case. Grillo replied that he thought it was good except for its criticism of a Special Agent (R. 568–569).

On July 19, McCaffrey received Glassman's permission to communicate with Gorin after showing Glassman a letter from another of Bergman's attorneys inconsistent with Gorin's back-dated letter (R. 573–574). The next day McCaffrey met Gorin. The latter stated that he and Grillo were close personal friends and that Grillo also wanted to drop the Bergman criminal case. Gorin bragged about "killing" other cases and stated that he would rather close a case in McCaffrey's office "because it would mean $50,000 rather than $10,000". He offered to pay for a trip to Paris or New York for McCaffrey and his wife, suggesting that he "pick up half a dozens suits at 250 bucks a copy" (R. 576–584). Subsequently, he bought McCaffrey a set of golf clubs (R. 591–592).

Between July 26 and August 10, Gorin and McCaffrey had numerous conversations and meetings. Gorin mentioned that Grillo planned to give him a list of cases coming from Hartford and requested a similar list from McCaffrey. They discussed the Bergman case as well as other cases. Gorin said that Grillo was trying to "kill" the Bergman case in his office (R. 587–593, 599–606, 610, 614).

On August 14, Gorin and McCaffrey met again. They discussed the protest made by the Intelligence Division to the memorandum proposing that no criminal action be taken against Bergman. They telephoned Grillo, who was not able to talk to them because a superior was in his office (R. 617–622). In a later conversation, Grillo told McCaffrey that he had tried to stop the protest without success (R. 622). Later that day, Grillo was seen going into the building where Gorin had his office (R. 505–506). Gorin subsequently told McCaffrey that Grillo would see him the next day (R. 626). Gorin informed McCaffrey in Bergman's presence that he had given Grillo $1,500 on the case and that he had promised him $2,500 more "if the case is killed in the protest" (R. 627).

On August 15, Gorin and Grillo came to McCaffrey's office. Grillo gave McCaffrey suggested arguments to counter the protest of the Intelligence Division. He said that he had gone into the Bergman case before, that Gorin had called him on it and that "I did all I could, but it became an impossibility and I dropped it." He also said, "I want to see this

case go by the board more than anybody else." At the conclusion of the conversation, Gorin said to Grillo, "Well, Henry, you have got the pitch, the three of us are working together." (R. 635–638). On August 26, Bergman, Gorin and Glassman were arrested (R. 24). On August 29, Gorin withdrew the $29,000 balance remaining in his trustee bank account and returned it to Bergman (R. 558–559).

ARGUMENT

1. The arrest of petitioners on August 26, 1961, was reported in local Boston newspapers for several days. The Attorney General was quoted as saying that the case had been skillfully investigated and that McCaffrey was a "courageous American and typifies the loyalty and integrity of the men of the Internal Revenue Service" (R. 24–25). On September 6, 1961, petitioners' indictment was returned. Petitioners contend that the statement of the Attorney General was calculated to prejudice the grand jurors against them and that it therefore vitiated the indictment. The statement was not inflammatory, however, and it could hardly have prejudiced the grand jurors. Compare the publicity in *Beck* v. *United States,* 298 F. 2d 622 (C.A. 9), certiorari denied, 370 U.S. 919. In presenting its case to the grand jury the government necessarily endorsed the credibility of McCaffrey; the publicized statement did no more than commend McCaffrey for his integrity. Petitioners argue that the government's role in issuing the news release requires a different result. But if, as here, the pub-

licity could not have had any serious prejudicial effect, its origin is immaterial.

2. The grand jurors who indicted petitioners and the petit jurors who convicted them were drawn from names selected from State jury lists, which, in turn, had been taken from registered voting lists after State officers had weeded out illiterates, felons and all persons exempt from jury service under State law. Mass. Gen. Laws, c. 234, § 1 (A. 110–123). There is no merit to petitioners' attack on this method of selection. Any adult citizen is eligible for federal jury service unless he is a felon, illiterate, or physically or mentally incapacitated. Congress has not, however, specified the means by which names of prospective jurors are to be obtained, delegating to the jury commissioners the task of selecting qualified jurors. 28 U.S.C. 1861 *et seq.* In a large metropolitan, politically conscious community such as Boston, the voting lists are as reasonable a method as any for obtaining a fair cross-section of the community. See *United States* v. *Agueci,* 310 F. 2d 817, 833–834 (C.A. 2), certiorari denied, 372 U.S. 959 (jury selected from voting lists in New York City); cf. *Chance* v. *United States,* 322 F. 2d 201 (C.A. 5), certiorari denied, October 12, 1964, No. 151, this Term. Unlike *United States* v. *Hoffa,* 196 F. Supp. 25 (S.D. Fla.), as *Chance* notes, the voting lists were not limited to male voters and women volunteers. Nor did the Civil Rights Act of 1957, 28 U.S.C. 1861, create a uniform nation-wide system for the selection of federal jurors. That statute dealt with qualifications for federal jury

service and not with the system whereby names are to be chosen.

3. Petitioners also contend (Pet. 27–32) that since McCaffrey disclosed confidential information to Glassman when they met on June 1, all of petitioners' subsequent unlawful conduct was "obtained as a consequence of unlawful official acts * * *" (Pet. 32), and evidence thereof should have been excluded by the district court. This contention lacks substance. For even assuming *arguendo* that McCaffrey's disclosures violated some statute or regulation,[2] it is sheer speculation to suppose, as petitioners do, that but for these disclosures, their unlawful acts would not have been committed. Indeed, by rejecting their defense of entrapment, the jury effectively foreclosed any such claim since it thereby determined, under the court's instructions, that government agents did not "induce and originate [petitioners'] criminal intent" (R. 438). Moreover, even if McCaffrey's alleged violations of federal secrecy statutes or regulations had contributed to petitioners' readiness to engage in unlawful conduct, the evidence would not

[2] The specific statutes cited by petitioners do not appear to cover information obtained by a government investigation of the accuracy of income-tax returns. 26 U.S.C. 7213(a)(1) covers only the information contained in the return, and 18 U.S.C. 1905 is limited, insofar as it is relevant here, to the "amount or source of any income, profits, losses, or expenditures of any person * * *." The disclosures here related to the size of the civil deficiencies, "the opening net worth figure and the closing net worth figure," the number of savings accounts maintained by Bergman, and the fact that it was a "strong case" (R. 334–335).

thereby be rendered inadmissible. Unlike the protections of the Fourth Amendment, which are aimed at preserving the right to privacy which an unreasonable search violates, the secrecy statutes and regulations on which petitioners rely are not intended to protect those to whom the secret information is unlawfully disclosed. Persons such as petitioner Glassman and those to whom he transmitted the confidential information are in no position, therefore, to assert the secrecy rules as a basis for excluding evidence used against them.

4. Petitioners claim that the evidence established entrapment as a matter of law. They contend (Pet. 44–50, 52–54) that McCaffrey first suggested the payoff and used Glassman as a pawn to entrap Gorin. The evidence showed, however, that before McCaffrey asked Glassman what he had in mind, Glassman had told McCaffrey that he had demanded $35,000 conditioned upon the criminal case being dropped by McCaffrey's office. He had also informed McCaffrey that the Bergman case had "enough of a fee in it for all of us." As for Gorin and Grillo, their own remarks, see pp. 7–8, *supra*, disclosed that they had tried to quash Bergman's prosecution at an earlier stage of the investigation. Accordingly, there was substantial evidence rebutting petitioners' claims that they had been entrapped. Indeed, as the court of appeals noted (Pet. App. A 2a–3a), since Glassman did not testify at this trial it is questionable whether there was even sufficient evidence of entrapment to warrant submission of that issue to the jury.

5. In its instructions on entrapment, the district court followed the rule laid down in the earlier opinion of the court of appeals. 313 F. 2d 653–654. After defining and explaining entrapment (R. 437–440), the court summed up entrapment in two questions of fact: Did the government induce the offenses, and, if so, were the defendants predisposed, without persuasion, to commit the offenses. The court then charged that the defendants were required to prove the first element—inducement—by a preponderance of the evidence, and that the prosecution had the burden of proving the second—predisposition—beyond a reasonable doubt (R. 441). The court had previously instructed that the government had the burden of proving guilt beyond a reasonable doubt and that this burden remained with the government throughout the trial and never shifted (R. 412).

Petitioner's argument (Pet. 54–55) that the court should not have submitted the issue of predisposition to the jury because there was no evidence of predisposition is without substance. On June 1, Glassman first mentioned that there was "a fee in it for all of us" (R. 518–519), and on June 14 he reported that he had demanded $35,000 in escrow (R. 522). On June 20, he noted that other cases might present similar possibilities (R. 530–532). As for Gorin, he bragged to McCaffrey about killing other cases (R. 576–584). Similarly, Grillo indicated that he and Gorin had been working together before McCaffrey was assigned to the case (R. 635–638). There was thus ample evidence of predisposition.

Petitioners also argue that it was error for the trial judge to instruct that petitioners had to establish inducement by a preponderance of the evidence. Although we do not agree with the court of appeals' view (313 F. 2d at 653) that it is desirable to separate the burden of proof on the elements of entrapment, we do not believe that this issue warrants review of this case. In this case, as in *Lopez* v. *United States*, 373 U.S. 427, 436–437, "[s]ince the record does not disclose a sufficient showing that petitioner was induced to offer a bribe, we cannot conclude that he was prejudiced by the charge on burden of proof, even assuming that the burden called for was too great."

6. McCaffrey's conversations with petitioners on June 20 and thereafter were recorded either with a minifon recording device or with a radio transmitter and a separate recorder. (See, *e.g.*, R. 46–48.) These recordings were properly admitted into evidence under the authority of *Lopez* v. *United States*, 373 U.S. 427. As in *Lopez*, one of the parties to the conversation, McCaffrey, testified regarding his recollection of the conversations. The claim that State law was violated by the recording of McCaffrey's conversations at Glassman's office and at places other than the Internal Revenue Service offices is unsound. The Massachusetts statute prohibits eavesdropping "secretly or without the consent of either a sender or receiver" unless a court order is obtained. Mass. Gen. Laws, c. 272 (1963 Cum. Supp.), § 99. McCaffrey was a party to the conversations and was, there-

fore, a "sender or receiver" within the meaning of the statute. Since the word "secretly" has not been construed by any Massachusetts court to extend the statute's proection to cases in which one party consents to having the conversation overheard or participates in recording the conversation, there is no reason to read the statute as prohibiting the recordings made and used in this case.

7. On August 26, 1961, Glassman was arrested under an arrest warrant by an inspector of the Internal Revenue Service and a Deputy United States Marshal and taken to the office of the marshal. He was requested to put all his personal effects on the desk and to empty his wallet. The inspector noted that Glassman had left some papers in his wallet and asked to see them. When Glassman replied that they were personal papers and were unimportant, the inspector told him that he would like to see them anyway. Glassman then produced a paper with notations which appeared to represent the manner in which the money to be paid for fixing the Bergman tax case was to be divided. The notations were copied by the inspector, and the copy was introduced into evidence (R. 82–85, 88–89).

Petitioners claim (Pet. 32–38) that the copy of the paper should have been excluded because the paper itself was of evidentiary value only and, as such, was not subject to seizure incident to a lawful arrest. But since the paper listed the division of the money to be paid for execution of the illegal scheme, it bore the earmarks of a memorandum in furtherance of the conspiracy and was, therefore, an instrumen-

tality of the crime. Consequently, it was similar to the papers held admissible in *Marron* v. *United States*, 275 U.S. 192, and *Abel* v. *United States*, 362 U.S. 217.

8. Complaints as to various other trial rulings are without merit:

(a) Petitioners assert (Pet. 43–44) that the court should have granted them a severance primarily so that they would be able to use their codefendants as witnesses to support their defense of entrapment. But the entrapment defense was asserted by all petitioners, and each would have had to testify in his own behalf to establish the defense. Hence there was no prejudice in trying petitioners together. Moreover, the desire of one defendant to call codefendants as witnesses does not require a severance. See *Olmstead* v. *United States*, 19 F. 2d 842, 847–848 (C.A. 9), affirmed, 277 U.S. 438; *United States* v. *Berman*, 24 F.R.D. 26, 28 (S.D. N.Y.); *United States* v. *Van Allen*, 28 F.R.D. 329, 338–339 (S.D.N.Y.).

(b) Petitioners claim (Pet. 55–56) that the court erred in refusing their motion at trial (R. 405–406) to strike certain of the overt acts (2, 3, 9 and 10) alleged to have been committed in furtherance of the conspiracies charged in counts one and three. They contend that McCaffrey induced the commission of these particular acts. Assuming, *arguendo*, that these overt acts could not have constituted a basis for conviction, petitioners were not prejudiced by the court's failure to strike them. It is clear that the jury, which found that the substantive violation alleged in count two had been committed, based its

verdict on overt acts other than the challenged ones. By its verdict on count two, the jury demonstrated that it believed that money had been paid to McCaffrey as charged in the first overt act of counts one and three. See *Giardano* v. *United Stataes,* 251 F. 2d 109, 115 (C.A. 8), certiorari denied, 356 U.S. 973. Moreover, with respect to count three, the conspiracy with which Grillo was charged arose under 26 U.S.C. 7214(a)(4), a statute which is violated even without the commission of any overt acts.

(c) Petitioners' final contention (Pet. 56–57)—that it was error to disallow a defense inquiry as to whether McCaffrey was "anxious for the government to prevail"—clearly presents no question appropriate for review by this Court. The extent of McCaffrey's interest was obvious from his testimony, and the court had allowed extensive cross-examination of the witness (R. 119–401). In these circumstances, it was permissible for the court to bar a concluding question of this sort.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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